

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLE BROWN)	
Claimant)	
VS.)	
)	
USD 259)	Docket No. 253,611
Respondent,)	
Self-Insured)	

ORDER

Respondent appealed the December 1, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 11, 2001, in Wichita, Kansas.

APPEARANCES

David M. Bryan of Wichita, Kansas, appeared for claimant. Robert G. Martin of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a May 26, 1998 accident. In addition to the left knee injury sustained at the time of the accident, claimant also alleges that as a natural consequence of that injury she developed plantar fasciitis in the right foot and back pain.

In the December 1, 2000 Award, Judge Barnes awarded claimant disability benefits for a 40.33 percent functional impairment to the left lower extremity, finding that claimant had sustained only a scheduled injury. The Judge denied respondent's request to reduce the award due to an alleged preexisting functional impairment.

Respondent contends Judge Barnes erred by failing to reduce the award for preexisting functional impairment to the left knee. Accordingly, respondent argues that

claimant's award should be reduced from 40.33 to 15 percent, based upon the opinions from claimant's surgeon, Dr. Naomi Shields.

Conversely, claimant contends the Judge erred by failing to find that her right foot plantar fasciitis and back complaints are the direct and natural consequence of her left knee injury. Accordingly, claimant requests the Board to award her benefits for an unscheduled injury, based upon the 27 percent whole body functional impairment rating provided by her expert medical witness, Dr. Pedro Murati.

The issues before the Board on this appeal are:

1. Is claimant entitled to an award for a scheduled injury to the left lower extremity or is she also entitled to receive benefits for either her right foot or low back, which she alleges were injured as the natural consequence of the left knee injury?
2. Should the award be reduced because of preexisting functional impairment to claimant's left knee? If so, did respondent prove the extent of the preexisting functional impairment?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. At the time of the regular hearing, claimant had worked for the respondent school district as a teacher for approximately 20 years.
2. On May 26, 1998, claimant injured her left knee while moving her classroom from a mobile unit into a building. The parties agree that claimant's accident arose out of and in the course of employment with respondent.
3. Claimant immediately reported the accident and sought medical treatment. On June 8, 1998, claimant had an anterior cruciate ligament (ACL) replacement and meniscus repair. But, because of continuing pain, claimant had additional knee surgery in October 1999. Several months following that surgery, claimant was released from medical treatment. According to claimant, she continues to experience pain and locking in her injured knee, which claimant's orthopedic surgeon, Dr. Naomi Shields, has said can only be resolved with a total knee replacement.
4. Claimant has walked with a limp since her first surgery in June 1998. In approximately September or October 1998, claimant began experiencing symptoms in her right foot that have been diagnosed as plantar fasciitis. Claimant also experiences discomfort in her low back that radiates up the right side. Claimant attributes both the foot and back symptoms to her continued altered gait.

5. Before the May 1998 accident, claimant had previously injured her left knee. That injury occurred more than 15 years ago and required roughly two doctor visits. Claimant described her knee injury as minor, testifying that the doctor prescribed no physical therapy and placed no functional impairment rating or restrictions on her. According to claimant, she did not restrict her activities after recovering from that incident but, instead, bicycled, water skied, ran, walked, danced and did whatever else she wanted.

But according to the records introduced at Dr. Shields' deposition that were created by claimant's family doctor, Dr. Richard H. Egelhof, claimant reported to him on February 26, 1998, that she had experienced swelling in her left knee for several weeks. Moreover, Dr. Shields' medical records indicate that on June 4, 1998, claimant told Dr. Shields that she had injured her left knee approximately 15 years earlier playing soccer, had been diagnosed as having ligament injuries and, following that accident, had to be careful turning.

6. Before the May 1998 accident, claimant also had consulted a doctor on one occasion for back pain. But, according to claimant, she was not given any treatment, restrictions, or functional impairment rating, because the doctor was unable to pinpoint the source of the problem.

7. On October 10, 2000, respondent deposed Dr. Shields, who treated claimant from May 28, 1998, through January 2000. The doctor testified that on June 8, 1998, she operated on claimant's left knee and found a partial medial and lateral meniscus tear and an ACL tear for which the doctor performed meniscectomies and an ACL reconstruction. Over a year later, on October 18, 1999, the doctor performed a second surgery and found increased arthritis in claimant's left knee and that the ACL graft had failed. The doctor last saw claimant on January 27, 2000, and has placed her in an unloading brace that claimant uses for such activities as walking and grocery shopping. According to the doctor, claimant is a candidate for a total knee replacement whenever she decides she can no longer tolerate the day-to-day pain.

8. Utilizing the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides), Dr. Shields rated claimant as having a 30 percent functional impairment to the left lower extremity due to the left knee injury. In a March 14, 2000 letter to respondent's Joanna Brittain, the doctor opined that 50 percent of claimant's knee problems preexisted the May 1998 accident. In that letter, the doctor wrote, in part:

Her [claimant's] anterior cruciate ligament deficiency is preexisting to her twisting injury at work, as is some of her arthritis. However, her twisting injury aggravated this situation and she has certainly shown marked progression of the arthritis since resection of her meniscus tears. Therefore, her anterior cruciate ligament instability is preexisting, however the twisting

injury and the subsequent meniscectomies contribute to her knee arthritis. I would recommend 50% be considered preexisting, 50% an exacerbation.

At her deposition, the doctor testified that 50 percent of claimant's impairment preexisted the May 1998 accident:

Q. (Mr. Martin) . . . You directed correspondence to Joanna Brittain of the school district on March 14, 2000 in which you indicate that 50 percent is preexisting of the impairment and 50 percent is an exacerbation. First of all, is that, in fact, what you wrote?

A. (Dr. Shields) Yes.¹

9. According to Dr. Shields, claimant's foot symptoms are probably not related to the left knee injury. In November 1998, claimant told the doctor about her foot symptoms and gave the doctor a history of doing toe raise exercises. The doctor prescribed limited treatment and never heard claimant complain again about foot problems.

10. On September 13, 2000, claimant deposed Dr. Philip Mills, who examined claimant in August 2000 after being appointed by the Judge to perform an independent medical evaluation. According to Dr. Mills, claimant could not remember whether she had injured her left knee or right knee years ago playing soccer. Claimant told Dr. Mills that the soccer injury resolved and that she went 15 years without additional medical treatment.

11. According to Dr. Mills, claimant has a 36 percent functional impairment to the left lower extremity that he attributed entirely to the May 1998 accident. That opinion was based upon the assumption that claimant had no previous impairment or restrictions due to the left knee and had received no medical treatment for the left knee for the 15 years since the soccer injury. But the record does not disclose whether the doctor was aware of Dr. Egelhof's notes from February 1998, in which claimant complained of swelling in the left knee. Dr. Mills could not establish a relationship between claimant's right foot problems and the left knee injury nor could he establish within a reasonable degree of medical probability a relationship between the knee and claimant's back complaints. Moreover, the doctor determined that neither claimant's foot problems nor back complaints would constitute a permanent impairment under the *AMA Guides*.

12. Claimant also deposed Dr. Pedro Murati, who was hired by claimant to provide opinions in this claim. The doctor examined claimant in June 2000 and diagnosed left knee pain following the medial and lateral meniscectomies and ACL reconstruction, lumbar strain, right sacroiliac joint dysfunction and right plantar fasciitis, all of which constitute a 27 percent whole body functional impairment according to the *AMA Guides*. Believing that

¹ Deposition of Dr. Naomi Shields, October 10, 2000; p. 9.

claimant's old left knee soccer injury did not interfere with any of claimant's activities of daily living, the doctor opined that claimant did not have a preexisting functional impairment before the May 1998 accident. But, again, the record does not disclose whether Dr. Murati was aware of the February 1998 left knee complaints recorded by Dr. Egelhof.

13. According to Dr. Murati, both claimant's plantar fasciitis and lumbar strain are caused by the left knee injury due to claimant altering her gait and placing more weight on the right leg and more pressure on the back. The doctor rates the plantar fasciitis as two percent impairment to the lower extremity and the lumbar strain as five percent to the whole body. The doctor rated claimant's left lower extremity at 55 percent.

CONCLUSIONS OF LAW

1. The Board affirms the Judge's conclusion that claimant is entitled to receive a 40.33 percent permanent partial disability for a scheduled injury to the left leg. But the Award should be modified to correct the amount of benefits payable for that disability.

2. The Judge rejected claimant's argument that she had sustained permanent injuries to her right foot and low back as a natural consequence of her left knee injury. Accordingly, the Judge awarded claimant benefits for a scheduled injury to the left lower extremity. The Board agrees.

The Board is persuaded by the testimony of Dr. Mills, who was appointed by the Judge as a neutral, unbiased medical expert to examine claimant and report his clinical findings and conclusions. Dr. Mills' opinions are credible and are adopted by the Board. Accordingly, the Board concludes claimant has failed to prove that either her right foot problems or low back symptoms are related to her May 1998 accident and the resulting left knee injury. Additionally, the Board concludes claimant has failed to prove that either the foot or back conditions constitute a permanent functional impairment under the AMA *Guides*.

3. The Board also affirms the Judge's finding that claimant has sustained a 40.33 percent functional impairment to the left lower extremity due to the left knee injury. That is an average of Dr. Shields' 30 percent rating to the lower extremity, Dr. Mills' 36 percent rating and Dr. Murati's 55 percent rating.

4. The Judge rejected respondent's argument that claimant's benefits should be reduced due to an alleged preexisting functional impairment. The Board agrees.

K.S.A. 1997 Supp. 44-501(c) provides that awards of compensation are to be reduced by the amount of preexisting functional impairment when there is an aggravation

of a preexisting condition. But the *Hanson*² case recognizes that preexisting conditions may not constitute preexisting impairment. Accordingly, *Hanson* requires employers and their insurance carriers to prove that preexisting conditions constitute preexisting impairment and the amount of that impairment. In *Hanson*, the Court stated:

A preexisting condition is distinct from a preexisting disability. When there is no evidence of the amount of preexisting disability or impairment due to a preexisting condition, there is nothing to deduct from the total impairment to ensure that the employer and/or its carrier are excused from covering the preexisting portion.³

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.⁴

Neither Dr. Mills nor Dr. Murati found that before the May 1998 accident claimant had an impairment to the left knee. The record is not clear whether Dr. Mills or Dr. Murati knew of Dr. Egelhof's February 1998 notes regarding claimant's left knee problems or whether they would have opined that claimant had a preexisting functional impairment in light of that information.

Considering Dr. Shields' testimony in context of her earlier March 2000 letter to respondent, the Board finds that Dr. Shields' opinions are equivocal and, therefore, fail to establish that claimant had a preexisting condition in her left knee that was subject to being rated as a permanent functional impairment under the AMA *Guides* or what that preexisting functional impairment percentage would be. When the doctor's testimony is considered in light of her letter, the Board finds Dr. Shields believes that 50 percent of claimant's knee condition preexisted the May 1998 accident. The Board notes Dr. Shields never directly or unequivocally stated that she would have rated claimant as having a 15 percent functional impairment for the knee before the May 1998 work-related accident.

The Board is troubled by Dr. Egelhof's February 1998 records that indicate claimant was complaining of left knee symptoms before the May 1998 accident, and claimant's failure to recollect that office visit. The Board suspects that claimant may have had some preexisting functional impairment in the left knee. But respondent has the burden of proof to establish the extent of preexisting functional impairment and it has failed to do so when,

² *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), rev. denied ____ Kan. ____ (2001).

³ *Hanson*, syl. 4.

⁴ *Hanson*, syl. 5.

in hindsight, it would have been relatively easy to ask Dr. Shields what functional impairment rating she would have given claimant according to the AMA *Guides* based upon claimant's physical condition as it existed immediately before the May 1998 accident. The Board cannot state what weight such evidence would have been given, but the Board can state with certainty that it would have been considered along with the other relevant evidence.

In short, claimant is entitled to receive permanent partial disability benefits for a "scheduled"⁵ injury for a 40.33 percent functional impairment to the left lower extremity as respondent has failed to establish the extent of preexisting functional impairment, if any.

5. The Board notes that respondent filed a Motion for Oral Argument requesting "the panel that decides the case" to hear oral argument. The Board refers respondent to K.S.A. 44-555c(k) that requires all five Board members to decide appeals from final awards. The statute provides:

For purposes of hearing cases, the board may sit together or in panels of two members or more, designated by the chairperson of the board, . . . All members of the board shall determine each matter before the board. All decisions, reviews and determinations by the board shall be approved in writing by at least three board members. . . .

Accordingly, although only three Board members' signatures may appear on the decision that is issued in an appeal from a final award, all the members participated in deciding the claim.

6. For future reference, the parties are reminded that only those medical records that are material to the issues need to be entered into the record. Introducing pages of medical records that have little evidentiary value, and no persuasive value, regarding the issues in controversy only hinders the review and study of the record.

7. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the December 1, 2000 Award entered by Judge Barnes to correct the benefits payable, as follows:

Carole Brown is granted compensation from USD 259 for a May 26, 1998 accident and resulting disability. Based upon an average weekly wage of \$802.27, Ms. Brown is

⁵ K.S.A. 1997 Supp. 44-510d(a)(16).

entitled to receive 8.28 weeks of temporary total disability benefits at \$351 per week, or \$2,906.28, plus 77.32 weeks of permanent partial disability benefits at \$351 per week, or \$27,139.32, for a 40.33 percent permanent partial disability to the left lower extremity, making a total award of \$30,045.60, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David M. Bryan, Attorney for Claimant
Robert G. Martin, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director